"My decision to surrender made the carrying of the revolver lawful." "My intention to cease committing an offence provides a lawful excuse for continuing temporarily to commit the offence". This is tantamount to saying that a man can change the nature of his act, from an unlawful to a lawful one, by a mere change in his intention. That may be true of offences of which intention is an ingredient, but it is not true of offences to which the doctrine of "absolute prohibition" applies.

In our view, even accepting the *bona fides* of the appellant's intention to surrender, this could not constitute a lawful excuse. If an administrator who is compelled by law to take possession of a deceased's property is found to have an un-licensed fire-arm in a suit-case not yet opened, he clearly has a lawful excuse. If a person finds a stick of dynamite on the road and takes it to the appropriate authorities, he clearly has a lawful excuse. If a terrorist after some time in the jungle decides to surrender with his arms, he has an excuse, and if he is acting on a "surrender leaflet" addressed to him by the security forces, he may have a political or an administrative excuse but, in our opinion, that does not amount to a lawful excuse within the meaning of the regulation.

In our view, the learned trial Judge adequately directed the assessors on "lawful authority", and rightly rejected the submission of Counsel for the accused at the trial that a "lawful excuse" had been established which entitled the accused to acquittal. The fact that he did not actually use the words "lawful excuse" did not appear to us to be of moment.

We dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: *Benjamin & Sen.*

MARY NG v. SINGAPORE IMPROVEMENT TRUST.

[A. C. J. (Brown, Ag. C.J.) October 20, 1953]
[Singapore — District Court Appeal No. 12 of 1953]

Landlord and tenant — Claim for possession of land coming within definition of 'premises' in s. 2 of the Control of Rent Ordinance, 1947 — Liberty to abandon excess claim for mesne profits in District Court — Onus of proving consent of landlord to erection of building.

This was a claim for possession of a piece of land whereon a building had been erected, and for mesne profits. Two points were raised at the appeal, firstly: at the date of trial the claim for mesne profits exceeded the jurisdiction of the District Court and therefore the Court was functus officio and the Judge should not have allowed the claim to be amended.

Held: under section 57 of the Courts Ordinance and Order 21, r.2 of the District Court Rules, the respondents (plaintiffs) were entitled to abandon the excess claim and that it was not necessary to abandon the claim in toto.

The second point raised turned on whether the land in question came within the definition of 'premises' in section 2 of the Control of Rent Ordinance. This depended on whether the building erected thereon had been erected with the consent of the landlords at the time of erection.

Held: the onus of proving such consent was upon the appellant. **Chang Gim Heng v. Credit Foncier**[3] distinguished.

Held further: the acceptance of rent after termination of notice to quit does not necessarily create a new tenancy.

[**Editorial Note:** The Control of Rent Ordinance, 1947 was repealed and replaced by the Control of Rent Ordinance, 1953.]

Cases referred to:—

(1) *Upton v. Farmer* 142 L.T. 526.
(2) *Legon v. Count* (1945) 1 All E.R. 710.
(3) *Chang Gim Heng v. Credit Foncier* (1952) M.L.J. 223.
(4) *Toleman v. Portbury* L.R. 5 Q.B. Cases 288.
(5) *Morrison v. Jacobs* (1945) 2 All E.R. 430.

DISTRICT COURT APPEAL.

G. J. Okell for the appellant.

J. D. Donnelly for the respondents.

Cur. Adv. Vult.

Brown, Ag. C.J. : — By an agreement in writing dated 20th December 1946 the appellant (who was the defendant in the Court below) became the tenant of the respondents in respect of a piece of land, having an area of 21,000 square feet, situate off the Tiong Poh Road at a monthly rental of $100. It was a term of the agreement that no structure should be erected without the permission of the respondents. On the 27th December 1946 the appellant applied in writing for permission to enclose the area with a zinc fence, which was to be covered by a zinc covering. It would appear from a letter dated 2nd January 1947, which was produced and admitted in evidence as Exhibit P-3, that permission was granted to enclose the area, but not to erect the covering; but no proof of this letter was forthcoming, and one of the points taken in this appeal is that the learned District Judge attached weight to a document which ought not to have been admitted. At the beginning of 1952 the appellant was given notice to quit. But having appeared before the Evictions Committee she was allowed to remain; and she continued to pay rent until the end of 1952, when she received a second notice to quit, terminating her tenancy on 31st January 1953. Thereafter she tendered the rent for February, March and April 1953, which was accepted; but it is clear from the evidence of the respondents that the rent was accepted in error.

The summons was dated 23rd February 1953. It claimed possession of the land and included a claim for *mesne profits* "from the 1st day of September 1952

till date of recovery of possession at the rate $200 per month". The suit came on for trial on 3rd June 1953, so that the money claim then exceeded the sum of $1,200 by which the District Court's jurisdiction is limited by section 60 of the Courts Ordinance. The learned District Judge allowed the plaintiffs' counsel to withdraw his claim for *mesne profits* in toto, and this is the subject of the first ground of appeal. Mr. Okell, in an able argument of this technical point, contended that although at the date of the summons the money claim was within the Court's jurisdiction, as it had exceeded the jurisdiction by the time the case came on for trial the Court was *functus officio* and the Judge had no power to allow a claim to be amended which the law forbids to be before it. He relied upon the judgment of Slesser, L.J. in *Upton v. Farmer*[1], in which a Divisional Court was divided, Scrutton, L.J. dissenting. But in the later case of *Legon v. Count*[2] the Court of Appeal preferred the view of Scrutton, L.J., and followed it. In *Legon v. Count*[2] the plaintiff claimed damages in the County Court without specifying the amount. The County Judge refused to allow the plaintiff to amend by adding the words "not exceeding £100". He took the view which Mr. Okell has argued, namely, that he had before him a claim for unlimited damages which he had no jurisdiction to try, and he could not allow an amendment of a claim which exceeded his jurisdiction and ought not to be before him. But the Court of Appeal held that he was wrong. Mr. Okell, in reply, said that in that case the claim did not on the face of it exceed the jurisdiction as in the present case, and that no case had been cited where it had been held that there was power to amend if, at the time the amendment is applied for, the claim on the face of it exceeds the jurisdiction. I think that the word "amend" in this connection tends to confusion. The plaintiffs in the present case were given leave to *abandon* their money claim. In fact they abandoned it in toto, although in my opinion it would have been sufficient if they had only abandoned so much of it as exceeded $1,200. I think that the authority for this is section 57 of our Courts Ordinance coupled with Order 21 r. 2 of the District Court Rules. I think that the former is analogous to section 42 of the County Courts Act, 1934, as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938; and that our Order 21 r. 2 is analogous to Order 15 r. 6 of the County Courts Rules, to which reference was made by MacKinnon, L.J., in *Legon v. Count*[2]. Mr. Okell points out that the wording of our legislation is different from the wording of the English legislation. That is true; but it seems to me that the effect is the same. The effect of section 57 of our Courts Ordinance is (to employ the wording of the English Act) that a plaintiff may abandon the excess, and the judgment of the Court in the action shall be in full discharge of all demands in respect of the cause of action. The English Order 15 r. 6 says in terms that "a plaintiff may, at any time before an action is called on for trial, or in opening his case, abandon any part of his claim". Our rule is not as specific. But our Rule, after saying that it is not competent for a plaintiff to withdraw any part of his claim without leave, goes on to provide that the Court may *at any time* order any part of the claim to be struck out. Basing my view on the decision in *Legon v. Count*[2] and upon what appears to me to be the analogy between the provisions of our law and the two provisions of the law in England to which reference was made in that case, I hold that the learned District Judge was right in allowing Mr. Donnelly to abandon his claim for *mesne profits*, although I do not think it was necessary to have abandoned it in toto.

It therefore becomes necessary to consider the more substantial point in this appeal, which is that the learned District Judge was wrong in holding that the Control of Rent Ordinance did not apply to the land in question. "Premises" are defined in section 2 of the Ordinance to mean :—

> "Any dwelling house, flat, factory, warehouse, office, counting house, shop, school and any other building in which persons are employed or work and any part of any premises let or sublet separately and includes any land whereon any such building is or has been erected with the consent of the landlord but does not include new premises built or completed after the commencement of this ordinance."

The claim here is for the land; and Mr. Donnelly contends that it is the second part of the definition which is material. Mr. Okell argues that, while that may have been the position before the first notice to quit, the respondents made a new demise when they accepted rent after giving the first notice to quit, and that they were then demising the land with the building on it; and there is evidence that persons work in the building so as to bring it within the first part of the definition. Therefore, he says, the second part of the definition no longer applies, and the position is governed by the first part. He says that where the building was erected prior to the demise the consent of the landlord is not necessary, and all that is required is that the building should fall within one of the several classes of building which are set out in the first part of the definition. But this argument seems to me to attach insufficient weight to two matters. The first is the fact that in this case it was the land that was demised, and not the building; and this is a claim to recover possession of the land. The second is the decision of this Court in *Chang Gim Heng v. Credit Foncier*[3]. The first matter seems to me to bring this case within the second part of the definition; and the decision

referred to is authority for saying that what is required, in the case of a building which is referred to in the second part of the definition, is the consent of the landlord at the time when the building was erected. The facts in the case of *Chang Gim Heng v. Credit Foncier*[3] were quite different to the facts in the present case; and upon the facts in that case the tenant succeeded in raising the presumption that the building (which had been erected at least 25 years earlier) had been erected with the consent of the landlord. I think that the very same question arises in the present case: has the appellant succeeded in raising a presumption that the building was erected with the consent of the landlord at the time it was erected?

Now upon the question of the burden of proof I have no doubt that the onus was upon the appellant, and that there is a clear distinction between the present case and *Toleman v. Portbury*[4] where the plaintiff, a lessor, sued for ejectment on a forfeiture for breach of contract not to permit a sale by public auction upon the premises without his consent in writing. By his particulars he averred that his lessee, who had underlet the premises to the defendant, had broken his covenant because he had assigned his goods upon the premises under a bill of sale to three persons who had sold the goods by public auction on the premises without the plaintiff's consent in writing. The burden was clearly upon the plaintiff to prove the forfeiture. He neither called evidence to prove that the public auction had been held with the permission of the lessee and therefore in breach of the lessee's covenant, nor did he call evidence to prove that he himself did not give his permission. Thus the proof of the forfeiture was incomplete and the plaintiff was non-suited. But in the present case the appellant claimed to be protected by the Rent Ordinance. She is only protected if the building was erected with the consent of the landlord. The onus was, therefore, upon her to prove the fact which would entitle her to the protection which she claimed.

She called no positive evidence to prove that the structure was erected with the respondents' consent. But, as in the Credit Foncier case, I am asked to presume that consent was given from the fact that for 4 years after the date upon which the respondents' Inspector, Mr. Samuel, became aware of the erection the respondents continued to accept rent; and further that after the second notice to quit on 22nd December 1952 they again accepted rent. But it is impossible to make any such presumption in the light of the evidence. When Mr. Samuel became aware of the erection on the 17th of February 1948 he reported the matter on the same day, and as a result the appellant was called before the Evictions Committee. Mr. Samuel, in cross-examination, said: "So far as I know the Evictions Committee disapproved the application for recovery of possession." The appellant, in her evidence, did not challenge Mr. Samuel's evidence on the point or refer to it at all. In the light of that fact it seems to me impossible to presume that the respondents consented to the erection of the building. As a fact they took proceedings to recover possession. They failed to obtain the approval of the Evictions Committee, with the result that the appellant remained in possession paying rent.

As for the acceptance of rent after the second notice to quit, it is clear from the evidence that this rent was accepted owing to the error of an inexperienced clerk who on the 9th March 1953 accepted one payment of 3 months' rent for February, March and April. Upon this slender fact Mr. Okell has based an argument that yet a further tenancy was created then, because the respondents appeared to be accepting the rent in the ordinary way and the appellant had no reason to suspect that the rent had been accepted by mistake. But it seems to me that the case which he cited is against him. In *Morrison v. Jacobs*[5] a tenant of a house to which the Rent Restriction Act applied remained in occupation after two notices to quit had been served on him, and the landlord being precluded by the Act from getting him out not unnaturally accepted the rent when he tendered it. MacKinnon, L.J., said:—

> "At common law if the landlord has acquired a right to claim possession against his tenant and instead of exercising that right he allows him to remain in the house and accepts rent from him as before, the parties by their conduct may with reason be held to have entered into a new contract of demise. **But the essential factor in these circumstances is that the landlord voluntarily abstains from turning the tenant out.**"

I have underlined the last sentence because it is the key to the point which Mr. Okell has sought to make, and it seems to me to dispose of his argument.

In the course of this appeal, which has been well and fully argued, only one further point was made and that was when I was asked to order a new trial having regard to the weight which the learned District Judge attached to the inadmissible letter dated 2nd January 1947. I must decline to accede to that request. The letter must be disregarded. But the onus was upon the appellant. And there is no evidence upon the record to show that the building was erected with the consent of the landlords and nothing upon the record from which any such consent ought to be presumed.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *Braddell Bros.*

Solicitors for the respondents: *Laycock & Ong.*